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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
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11 JOSE LUIS LEON,

12 Petitioner,

13 vs.  
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15 MATTHEW CATE, Secretary,  
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17 Respondent.  
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CASE NO. 09cv2219-LAB (WMc)

**ORDER ADOPTING REPORT  
AND RECOMMENDATION;**

**ORDER REQUIRING FILING OF  
VERDICT FORM AND  
TRANSCRIPT; AND**

**ORDER REQUIRING PETITIONER  
TO DISMISS UNEXHAUSTED  
CLAIMS OR FACE DISMISSAL  
OF HIS PETITION**

[Docket Numbers 6, 10.]

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20 Petitioner, a prisoner in state custody, filed a petition seeking habeas relief.  
21 Respondent moved to dismiss the petition pursuant to *Rose v. Lundy*, 455 U.S. 509, 510  
22 (1982) because it presented both exhausted and unexhausted claims. Petitioner filed an  
23 opposition, requesting that the petition be stayed while he exhausts the two unexhausted  
24 claims. These matters were referred to Magistrate Judge William McCurine for a report and  
25 recommendation. On June 9, Judge McCurine issued his report and recommendation (the  
26 "R&R"), recommending that a stay be denied because Petitioner had not shown good cause  
27 and recommending that Petitioner be required either to dismiss his petition or to delete the  
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1 two unexhausted claims. After seeking and obtaining an extension of time in which to object  
2 to the R&R, Petitioner filed his objections on July 23.

3 Petitioner agrees with the R&R's recitation of the facts and procedural history, and  
4 agrees his third and fourth claims (for ineffective assistance of trial counsel and appellate  
5 counsel, respectively) were unexhausted. He only disagrees on the issue of good cause.  
6 Petitioner also asks that if his petition is not stayed, he later be permitted to amend it as  
7 discussed in *Kelly v. Small*, 315 F.3d 1063, 1070 (9th Cir. 2003).

8 After Petitioner's conviction became final, he pursued one round of appeal in  
9 California's courts. He filed no habeas petitions in state court.

#### 10 I. Legal Standards

11 A district court has jurisdiction to review a Magistrate Judge's report and  
12 recommendation on dispositive matters. Fed. R. Civ. P. 72(b). "The district judge must  
13 determine de novo any part of the magistrate judge's disposition that has been properly  
14 objected to." *Id.* "A judge of the court may accept, reject, or modify, in whole or in part, the  
15 findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(C).  
16 The Court thus reviews de novo those portions of the R&R to which specific written objection  
17 is made. *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003).

18 Under *Rhines v. Weber*, 544 U.S. 269 (2005), the Court has discretion to stay a mixed  
19 habeas petition to allow the petitioner to present his unexhausted claims to the state court  
20 and then return to federal court for review of his petition. The petitioner must, however,  
21 show good cause for failure to exhaust, and the claims must not be "plainly meritless." *Id.*  
22 at 277. Petitioner bears the burden of showing good cause. *Id.* at 278.

23 The *Kelly* procedure remains available even after *Rhines*. *King v. Ryan*, 564 F.3d  
24 1133, 1136 (9th Cir. 2009). *Kelly* does not require a showing of good cause for failure to  
25 exhaust, but is more cumbersome for the petitioner. *Id.* Under *Kelly*, a petitioner does not  
26 have to show good cause for failure to exhaust, but is required to delete unexhausted claims.  
27 The petition, containing only exhausted claims, then remains pending in federal court while  
28 the petitioner exhausts his state claims. But to be considered timely, a habeas petitioner's

1 new claims must relate back to properly exhausted claims pending in a federal petition, not  
2 to an earlier version of the petition. *Id.* at 1141. Simply arising from the same trial or  
3 conviction is not sufficient; the claims must share the same core of operative facts. *Id.* *Kelly*  
4 does nothing to protect the unexhausted claims from becoming untimely in the interim. *Id.*

5       Petitioner's unexhausted claims are for ineffective assistance of counsel. A petitioner  
6 claiming ineffective assistance of counsel must demonstrate that the defense attorney's  
7 representation fell below an objective standard of reasonableness, *Strickland v. Washington*,  
8 466 U.S. 668, 688 (1984), and that the attorney's deficient performance prejudiced him. *Id.*  
9 at 693–94. Judicial scrutiny of counsel's performance is "highly deferential" and there is a  
10 strong presumption that counsel's performance falls within the "wide range of professional  
11 assistance." *Id.* at 689. "The reasonableness of counsel's performance is to be evaluated  
12 from counsel's perspective at the time of the alleged error and in light of all the  
13 circumstances, and the standard of review is highly deferential." *Kimmelman v. Morrison*,  
14 477 U.S. 365, 381 (1986) (citation omitted). The petitioner bears the burden of showing that,  
15 but for his counsel's unprofessional errors, there is a reasonable probability the result would  
16 have been different. *Strickland*, 466 U.S. at 689 (citation omitted); *accord Porter v.*  
17 *McCollum*, 130 S.Ct. 447, 455 (2009) (explaining that habeas petitioner bears the burden  
18 of showing he was prejudiced by his counsel's deficiency).

19       The *Strickland* standard does not require counsel to preserve all issues that might  
20 conceivably be meritorious, nor does it allow the Court to deem such issues preserved  
21 simply because some competent counsel might have raised them. Such an argument was  
22 raised and rejected in *Lowry v. Lewis*, 21 F.3d 344, 346 (9th Cir. 1994). There, a habeas  
23 petitioner argued his trial counsel should have moved to suppress certain evidence, claiming  
24 such motions would have succeeded. The appellate court noted that, if it were certain the  
25 evidence would have been suppressed, the trial counsel's performance would have been  
26 deficient. But because trial counsel had no reason at the time to know the motion would be  
27 granted, his performance was not deficient, even if later rulings showed the motions might  
28 have succeeded. The court noted that counsel are not required to file every potentially

1 meritorious motion on the theory that a defendant has everything to gain and nothing to lose.  
2 Rather, the court discussed in detail several very sound reasons why an attorney might not  
3 file such motions.

## 4 **II. Petitioner's Unexhausted Claims**

### 5 **A. Nature of Claims**

6 The jury convicted Petitioner of a violation of one count of aiding and abetting second  
7 degree murder, and one count of making a criminal threat. The jury also found that the  
8 murder was committed with a firearm, that Petitioner used a firearm while making the  
9 criminal threat, and that both offenses were committed for the benefit of a criminal street  
10 gang.

11 Petitioner's third claim, for ineffective assistance of trial counsel, is based on several  
12 arguments. At trial, the court admitted the murder victim's statement, made to his mother  
13 several weeks before the murder, that he was afraid of Petitioner and that Petitioner had said  
14 he would be killed. Petitioner argues his counsel should have objected to admission of this  
15 evidence. Petitioner also argues that when the trial court admitted it to prove an element of  
16 the charge of making a criminal threat, his counsel should have requested a limiting  
17 instruction directing the jury to consider it only for that purpose. As part of this claim  
18 Petitioner also alleges his attorney failed to adequately investigate the physical evidence  
19 before trial. The physical evidence concerned the alleged lack of gunshot residue in the car,  
20 which Petitioner argues undercuts the testimony of two witnesses who testified the victim  
21 was shot at close range.

22 Petitioner's fourth claim, for ineffective assistance of appellate counsel, stems from  
23 remarks made by a juror after the verdict was taken. After the jury delivered its verdict, the  
24 jurors affirmed their verdict in open court, no party requested that the jury be polled, and the  
25 verdict was recorded, one or two jurors questioned whether the jury had actually deliberated  
26 the finding that the crimes were gang-related. The court questioned the others, who all said  
27 the matter had been the subject of deliberation. In the end, one juror couldn't recall ever  
28 discussing the finding. During questioning, at least nine jurors said they remembered

1 deliberating these findings. The court denied a new trial on these issues. Petitioner now  
2 argues his appellate counsel was ineffective for failing to appeal the trial court's error in  
3 failing to investigate this adequately as required by California law.

4 Petitioner appears to be asking the Court to grant him relief as if the state courts had  
5 made the wrong rulings on the issues he now raises. But it is worth noting that both of the  
6 unexhausted claims are for ineffective assistance of counsel, not for the underlying alleged  
7 errors; claims based directly on the underlying errors were never raised and are procedurally  
8 barred. Nor do *Strickland* or other relevant precedents allow a petitioner to use ineffective  
9 assistance claims as a back door through which he may bring all underlying claims that  
10 otherwise would be lost. Trial counsel's effectiveness is evaluated on the basis of what the  
11 attorney knew at the time and what other choices were available, not on the Court's  
12 evaluation of counsel's performance in hindsight. *Taylor v. Illinois*, 484 U.S. 400, 434  
13 (1988). The Court will not rule on those issues now and find trial or appellate counsel  
14 ineffective for having failed to anticipate those rulings. *Lowry*, 21 F.3d at 346 ("[Petitioner's]  
15 lawyer cannot be required to anticipate our decision in this later case, because his conduct  
16 must be evaluated for purposes of the performance standard of *Strickland* 'as of the time of  
17 counsel's conduct.'")

18 Petitioner said his trial counsel misplaced his files, and therefore Petitioner could not  
19 exhaust these claims in state court. The R&R found that Petitioner knew all the underlying  
20 facts because he was present at his trial and because they appear in the trial record. The  
21 R&R also determined that Petitioner didn't need the missing files in order to exhaust his  
22 claims, so there was no reason for him to wait. Petitioner's objections to the R&R say he  
23 has now received his trial counsel's files.

#### 24 **B. Exhaustion**

25 Reviewing de novo the question of good cause, the Court finds (with one possible  
26 exception) that Petitioner was aware of the necessary facts to raise the claims this petition  
27 mentions. Petitioner was present at trial when the victim's mother's statement was admitted  
28 and when no limiting instruction was given. Allegations of jury misconduct were also dealt

1 with in open court and Petitioner knew about them. Furthermore, any of Petitioner's  
2 attorneys could have learned all this information from the trial record. At any time Petitioner  
3 could have brought an appeal and sought state habeas relief based on ineffective assistance  
4 of counsel and failure of his counsel to raise a *Crawford v. Washington* confrontation clause  
5 claim as he now says his attorney should have done at trial. And while Petitioner has said  
6 his trial counsel misplaced the files, his appellate counsel did not misplace files. Petitioner  
7 had notice of what claims his appellate counsel raised, and the lack of files didn't affect his  
8 ability to exhaust this claim. It is therefore evident Petitioner had no good cause for failure  
9 to exhaust these claims.

10 The one possible exception is Petitioner's allegation that his trial counsel did not  
11 conduct adequate pretrial investigation. It's possible Petitioner knew this all along, in which  
12 case he could and should have exhausted his claim already. If he didn't know about it all  
13 along, he hasn't adequately explained when he did find out. The only source of new  
14 information Petitioner has pointed to is his trial attorney's files, which he now has. But he  
15 hasn't identified any details from the files to support this claim. The two reasonable  
16 conclusions are that Petitioner either 1) knew all along his trial attorney hadn't conducted an  
17 adequate investigation; or 2) never had and still does not have any reason to think his trial  
18 attorney failed to conduct an adequate investigation. If the first is true, he has no good  
19 cause for failure to exhaust his claim; if the second is true, he has no claim to exhaust.

20 The alternate *Kelly* procedure would be of no help to Petitioner. Petitioner's third  
21 claim does not rely on the same operative facts as any exhausted claim and is thus time-  
22 barred. His fourth claim (pertaining to alleged jury misconduct) is based on the same facts  
23 as his exhausted second claim (that his due process rights were violated when the trial court  
24 refused to order a new trial in spite of possible juror misconduct). But while this claim may  
25 not be time-barred, it is plainly not meritorious, as discussed below.

26 The Court therefore finds there was no good cause for Petitioner's failure to exhaust  
27 these claims, and he is not entitled to a stay under *Kelly*. None of the unexhausted claims  
28 is meritorious, with the possible exception of the claim that his trial counsel failed to conduct

1 adequate pretrial investigation. The only reason this last claim is not obviously non-  
2 meritorious is that it is short on specifics and lacking in evidence of any kind.

### 3 **C. Merits of Unexhausted Claims**

4 While it will likely be of little comfort to Petitioner, it does not appear the failure to  
5 exhaust made any difference, because his unexhausted claims lack merit. Both Petitioner's  
6 unexhausted claims are for ineffective assistance of counsel: his third claim is for ineffective  
7 assistance of counsel at trial, and his fourth claim is for ineffective assistance of counsel on  
8 appeal. A criminal defendant has the right to effective assistance of counsel both at trial and  
9 in the first appeal of right. *Kimmelman*, 477 U.S. at 378 n.2 (citation omitted).

10 In examining Petitioner's third claim, the Court considers whether Petitioner's trial  
11 counsel would have reason to know an objection to the evidence would have been  
12 sustained, and that a limiting instruction would have been given if requested. The California  
13 Court of Appeal considered these questions (see Lodgment 2 at 12–17) and determined the  
14 trial court properly admitted them under exceptions to the hearsay rule and that the  
15 statement was relevant to all charges against Petitioner. That court was uncertain whether  
16 a limiting instruction would have been given if requested. (*Id.* at 22–24.) Petitioner's  
17 *Crawford*-based confrontation clause claim would not succeed because the admitted  
18 statement was not testimonial, and his trial counsel conceded as much. (Pet., 9:22–23; Obj.  
19 to R&R, 7:1–2.) This concession was reasonable, because the victim's statement to his  
20 mother was non-testimonial. See *United States v. Orozco-Acosta*, 607 F.3d 1156, 1160–61  
21 (9th Cir. 2010) (discussing characteristics of testimonial statements). See also *Ponce v.*  
22 *Felker*, 606 F.3d 596, 600 n.2 (9th Cir. 2010) ("The Supreme Court has yet to define  
23 precisely what are 'testimonial' and 'non-testimonial' statements.") Petitioner's trial counsel  
24 was therefore not objectively unreasonable in failing to object to the evidence, request a  
25 limiting instruction, or raise a *Crawford* challenge to it.

26 In evaluating whether a petitioner was prejudiced, courts "must consider the totality  
27 of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695. Here, both the petition  
28 itself and a review of the state appellate decisions makes clear the case against Petitioner

1 was substantial. According to the petition, the evidence included the testimony of two  
2 eyewitnesses, passengers in the victim's car, who said they saw Petitioner and his co-  
3 defendant approach the car, saw Petitioner display a gun and ask the victim "Do you want  
4 me to shoot you?" and looked back after the victim was shot to see the co-defendant  
5 pointing a gun at the car. (Pet., 5:17–6:4.) When they saw the victim had been shot in the  
6 back of his head, they drove to a nearby fire station for help. (*Id.*, 6:5–6.) In view of this  
7 evidence, it is unlikely the admission of a statement by the victim's mother about a  
8 conversation weeks earlier affected the outcome.

9 Petitioner also argued his counsel

10 failed to provide any physical evidence or expert testimony, or to raise on  
11 cross-examination of the prosecution's experts, that the version of events  
12 testified to by [the two eyewitnesses was] inaccurate because there was no  
13 gunshot residue found in the [car] after [the victim] had been shot or that  
the single gunshot wound to his head could not have been fired from the  
close range claimed by the two witnesses.

14 (Pet., 10:13–18.) Even accepting the bare representations that no gunshot residue was  
15 found in the car and that the victim was not shot at close range, there is no showing why this  
16 contradicts the eyewitnesses' testimony, much less shows their testimony about the killing  
17 would likely have been disregarded. Even if this evidence exists, Petitioner has not shown  
18 why his counsel was unreasonable in not presenting it, nor has he shown any likelihood the  
19 outcome would be different. There is no explanation why gunshot residue would be  
20 expected to be in the car, or why the range at which the victim was shot was important.  
21 What is more, now that Petitioner has his trial counsel's files, his objections to the R&R  
22 include no further explanation and mention no evidence. In other words, even after obtaining  
23 the files he sought, Petitioner still has not shown how he was prejudiced by the alleged  
24 failure.

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1 With regard to Petitioner's fourth claim, his counsel raised the jury misconduct<sup>1</sup> issue  
 2 on appeal, and the appellate court considered how the trial court addressed the situation and  
 3 rejected the claim, finding the trial court's determination that no misconduct occurred was  
 4 supported by substantial evidence. The record shows the trial court made inquiries of the  
 5 jurors but decided not to conduct a full hearing after verdicts had been returned on all  
 6 counts. The appellate decision says "the trial court would have been well advised to have  
 7 conducted an inquiry with respect to the alleged misconduct, after the close of deliberations."  
 8 (Lodgment 2 at 38 n.11.) This comment appears intended to guide trial courts in the future,  
 9 clarify the scope of the ruling, and possibly streamline adjudication by suggesting a theory  
 10 Petitioner might raise immediately rather than later, during a round of habeas review. There  
 11 is no showing the appellate court thought the claim was meritorious, and the opinion  
 12 specifically avoids reaching the issue or inquiring further. (Lodgment 1 at 38 n.11.)

13 Petitioner now wishes to argue that his appellate counsel should have sought relief  
 14 on the grounds that the trial judge failed in his obligation to investigate the allegations.  
 15 According to the Petition, the appellate court "specifically noted its concern that the trial court  
 16 had failed to conduct its own inquiry as to juror misconduct." (Pet., 9:6–8.) To be clear, the  
 17 appellate court's concern wasn't that the trial court had failed to look into the matter at all,  
 18 but rather that it hadn't followed its initial inquiries with a more thorough investigation at the  
 19 end of trial.

20 A claim that the trial court should have investigated alleged jury misconduct more  
 21 adequately is derivative of the jury misconduct claim, which was raised and rejected on  
 22 appeal and which forms Petitioner's second claim here. It is worth remembering that the  
 23 primary claim was supported by argument based on the record. According to this argument,  
 24 the record showed the misconduct happened and merited a new trial. In contrast, the

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 26 <sup>1</sup> "Misconduct" is probably too strong a term for what allegedly took place. Apparently  
 27 after the verdict was taken, the jurors affirmed their verdict, and the verdict was recorded,  
 28 one or two jurors said they didn't think they had deliberated on the gang enhancement  
 finding. One juror had already been excused, but the remainder said they had deliberated  
 on that issue. The trial court questioned the jurors, apparently concluded they did deliberate,  
 and declined to pursue the matter further. The court later refused to disturb the verdict.

1 collateral claim would have relied on a theory that the trial record was inadequate because  
2 the judge hadn't made sufficient inquiry. In other words, the claims are based on two very  
3 different constructions of the trial record. While it's possible to argue contradictory theories  
4 in the alternative, it's also not unreasonable to abandon the weaker claim and focus  
5 vigorously on the stronger. The record suggests Petitioner's counsel's decision to abandon  
6 the collateral claim was a calculated move: even after receiving the appellate decision, he  
7 did not attempt to raise the collateral claim in his petition for review, and instead focused in  
8 more detail on the misconduct claim. (Lodgment 2 at 26–33.)

9 Petitioner's appellate counsel thus wasn't unreasonable in focusing on the primary  
10 misconduct claim and abandoning the collateral claim. The pleadings don't show Petitioner's  
11 appellate counsel had any reason to believe the collateral claim was stronger or that he  
12 should pursue both claims. Furthermore, Petitioner hasn't shown prejudice, because he  
13 hasn't attempted to show a reasonable probability his collateral claim would have  
14 succeeded.

### 15 **III. Conclusion and Order**

16 After review of the claims, it is apparent the Court will be required to review the trial  
17 court record to adjudicate Petitioner's second claim for jury misconduct. Respondent is  
18 therefore **ORDERED** to obtain and file a copy of the verdict form, and a copy of the trial court  
19 transcript covering at least the period from the taking of the verdict through the recording of  
20 the verdict. Respondent must file these no later than Friday, October 8, 2010, but an  
21 extension of this date for good cause shown may be granted by Magistrate Judge McCurine.

22 Petitioner's objections to the R&R are **OVERRULED** and the Court **ADOPTS** the R&R  
23 as modified. The motion to dismiss is **GRANTED IN PART**, as explained in the R&R. The  
24 motion to stay and the request for leave to amend the petition pursuant to *Kelly v. Small* are  
25 both **DENIED**. Petitioner shall file an amended complaint no later than 14 calendar days

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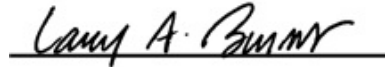
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1 from the date this order is issued, omitting the dismissed claims. If he does not do so, the  
2 mixed petition will be dismissed as required under *Rose*, 455 U.S. at 510.

3 **IT IS SO ORDERED.**

4 DATED: September 8, 2010

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6 **HONORABLE LARRY ALAN BURNS**  
7 United States District Judge  
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